

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAMON NAVARRO LUPERCIO,

Petitioner,

v.

PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

Case No. 1:20-cv-00925-NONE-JDP

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS TO DISMISS
PETITION

(Doc. No. 6, 8)

Petitioner Ramon Navarro Lupercio, a state prisoner proceeding without counsel, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1.) Therein he alleges that he received ineffective assistance from his counsel; the trial court erred in denying his motion to continue his trial; there was insufficient evidence presented at his trial to support his conviction; he has discovered new, exculpatory evidence; and perhaps that evidence was presented to the jury outside the presence of his attorney.¹ (*Id.*) This action was referred to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

¹ This is how the assigned magistrate judge characterized petitioner's final claim. (Doc. No. 6 at 2.) In reviewing the pending petition at the cited pages, the undersigned has not found such a claim, though petitioner's allegations are difficult to decipher. In any event, the precise nature of petitioner's claims is irrelevant to the issues addressed in this order.

1 On July 9, 2020, the assigned magistrate judge issued findings and recommendations,
2 recommending that the pending petition be dismissed as an unauthorized second or successive
3 petition. (Doc. No. 6.) Specifically, the findings and recommendations note that this is
4 petitioner's fifth petition seeking federal habeas relief with respect to this same state court
5 conviction. (*Id.*) For a second or successive petition, petitioner was required to obtain leave of
6 the Ninth Circuit before proceeding. (*Id.* (citing 28 U.S.C. § 2244(b)(3)).) The findings and
7 recommendations also note that petitioner's first habeas petition, filed in 2008, was dismissed as
8 untimely; however, the filing of an untimely petition barred by the applicable statute of
9 limitations set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA") does render
10 subsequently filed federal habeas petitions second or successive under AEDPA. (*Id.* (citing
11 *McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009)).) Petitioner has not sought authorization
12 from the Ninth Circuit for any of his subsequently filed petitions including the one now pending
13 before the court. (*Id.*)

14 The findings and recommendations were served on petitioner and contained notice that
15 objections thereto were due within 30 days of service. (*Id.*) Petitioner did not file any objections
16 to the pending findings and recommendations and the time to do so has passed.

17 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, this
18 court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the
19 court concludes that the findings and recommendations are supported by the record and proper
20 analysis.

21 Having found that petitioner is not entitled to habeas relief, the court now turns to whether
22 a certificate of appealability should issue. A prisoner seeking a writ of habeas corpus has no
23 absolute entitlement to appeal a district court's denial of his petition, as an appeal is only allowed
24 under certain circumstances. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 537 U.S. 322, 335-336
25 (2003). In addition, Rule 11 of the Rules Governing Section 2254 Cases requires that a district
26 court issue or deny a certificate of appealability when entering a final order adverse to a
27 petitioner. *See also* Ninth Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th
28 Cir. 1997). If, as here, a court dismisses a petition for a writ of habeas corpus, the court may only

1 issue a certificate of appealability when “the applicant has made a substantial showing of the
2 denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make a substantial showing, the
3 petitioner must establish that “reasonable jurists could debate whether (or, for that matter, agree
4 that) the petition should have been resolved in a different manner or that the issues presented
5 were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473,
6 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). In the present case, the court
7 concludes that petitioner has not made the required substantial showing of the denial of a
8 constitutional right to justify the issuance of a certificate of appealability. The court therefore
9 declines to issue a certificate of appealability.

10 Accordingly:

- 11 1. The findings and recommendations issued on July 9, 2020 (Doc. No. 6) are adopted;
- 12 2. The petition for writ of habeas corpus (Doc. No. 1) is dismissed;
- 13 3. Petitioner’s outstanding motion for discovery (Doc. No. 8) is denied as moot;
- 14 4. The court declines to issue a certificate of appealability; and
- 15 5. The Clerk of Court is directed to assign a district judge to this case for the purposes of
16 closure and to close this case.

17 IT IS SO ORDERED.

18 Dated: September 2, 2020

19 
UNITED STATES DISTRICT JUDGE